83-593

Office-Supreme Court, U.S.
FILED
AUG 29 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1983

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants,

vs.

STATE TAX COMMISSION OF MISSOURI,
Respondents.

On Appeal from the Supreme Court
of the State of Missouri

Jurisdictional Statement

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QUESTIONS FOR CONSIDERATION

1. Whether the Supreme Court of Missouri erred ir asserting the sovereign immunity of Missouri to dismiss lower ccurt judgments against the State based on Federal Constitutional Violations, Violations of an Interstate Compact, and Federal Civil Rights Violations.

2. Whether the Supreme Court of Missouri erred in failing to award interest or attorney fees on federal civil right judgments in state court.

3. Whether the Supreme Court of Missouri erred in employing Section 136.035, R.S. Mo. 1969 as a local rule of practice to defeat or diminish federal claims as follows:

a. By not permitting a class action on

the federal claims although the lower Missouri Courts had certified and given notice to the class, and although the general Missouri Supreme Court Rules and Federal Rules of Civil Procedure authorize such a class.

b. By letting stand the State Tax Commission ruling that the pendency of the class action did not toll the two year statute of limitations, thereby barring all federal claims by the unnamed members of the class.

c. By refusing to toll the two year statute of limitations by reason of the misrepresentation of Missouri officials found by the lower Missouri Court.

d. By failing to award interest on the federal claims.

INDEX

Page

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 6

Questions for Consideration 7

Statement of the Case (Including How the Federal Questions Were Raised and Decided Below)..... 8

The Federal Questions Are Substantial 22

A. There Is No Sovereign Immunity Protecting A State Against Suits Based On Federal Constitutional Violations Or Violations Of Interstate Compacts.....25

B. The State Of Missouri May Not Qualify Or Condition Federal Rights By Local Rules Of Practice Including Chapter 136 RS MO 1969.....26

C. A Class Action Is Proper In This Action Under The Appropriate Federal Law Which Must Govern.....31

D. Any Statute Of Limitations Is Tolled By The Filing Of A Class Action And Principles Of Estoppel Based on Misrepresentations.....34

E. Due Process Would Be Violated If This Court Fails At Least To Toll The Statute of Limitations By Reason Of The Pendency Of The Class Action 38

F. Federal Law Governing Interest (And Attorney Fees) On Federal Claims Is Controlling.....40

Conclusion.....43

Appendix

A. Judgment of the Circuit Court Of Missoui April 20, 1981..... 1

B. Opinion of the Supreme Court Of Missouri May 31, 1983..... 1

C. Amicus Curiae Brief On Behalf of Rocor International, April 20, 1981..... 1

D. Notice of Appeal..... 1

TABLE OF CASES

Pages

American Pipe & Constr. Co. v. Utah, 414 U.S. 539 at 551, 94 S.Ct. 756, 38 L.Ed.2d 713 at 725 (1974).....35

Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974).....26
Board of Com'rs of Jackson County Kans. v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939) 29

Charles v. Spradling, 524 S.W.2d 820 (Mo. Banc. 1975) 39
Consolidated Freightways Corp. of Delaware v. Nicholas, 258 Iowa 115, 157 N.W.2d 900 (1965).....11
Cox v. Roth, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955).....28

Davis v. Wechsler, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143 (1923).....27
Dice v. Akron, Canton and Youngstown Railroad Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952) 27
Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).....28

General Expressways, Inc. v. Iowa Reciprocity Board, 163 N.W.2d 413 (Iowa, 1968) 11

Hampton v. City of Chicgao, 284 F.2d 602 (7th Cir. 1973).....26

Ladue Local Lines, Inc. v. Bi-State Development Agency

of the Missouri-Illinois Metropolitan District, 433 F.2d 131 (8th Cir. 1970).....30

McCulloch v. Maryland, 3 Wheat. 316 (1819).....29
Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970).....37

Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967).....29

Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) 30
Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1958).....30
Prudential Insurance Co. v. Cheek, 259 U.S. 530 (1922).....2

Sibron v. New York, 392 U.S. 40 (1968) 5
State ex rel. Brady Motor, Inc. v. State Tax Commission, 517 S.W.2d 133 (Mo. 1974) 9,10

Tucker v. Owen, 94 F.2d 49 (5th Cir. 1938) 38

Williams v. Horvath, 16 Cal.3d 834, 548 P.2d 1125 (1976)..... 28
Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969)..... 28
Wright v. State of Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963) 27

York v. Guaranteed Trust Co. (2d Cir. 1944), 143 F.2d 503, Rev'd on other grounds, 326 U.S. 99 (1949)..... 34

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

United State Constitution

Article IV, Section 2; Privileges and Immunities of Citizenship.....3,6
Article VI, Supremacy Clause.....3,6

Fourteenth Amendment (Equal Protection, Due Process and Privilege and Immunity Clauses).....4,6

Federal Statutes

28 U.S.C. 1257(2)..... 2

28 U.S.C. 2103..... 6

28 U.S.C. 1961.....40

Missoui Statutes

R.S. Mo. 1969 Section 136,035(1) and (3) 4,6

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Jurisdictional Statement

Opinion Below

The opinion of the Supreme Court of Missouri is set forth in Appendix B hereto. The opinion and judgment of the Circuit Court of Missouri is set forth as Appendix A. The Notice of Appeal is Appendix D.

JURISDICTION

Jurisdiction of this court is invoked

pursuant to 28 U.S.C. § 1257 (2), this being an appeal which draws into question the validity of 136.035 R.S. No. 1969 as applied to federal claims on the ground that it is repugnant to the Constitution of the United States, Article VI, The Supremacy Clause.

Appellants also contend that the judgment is founded on other errors, which though not subject to review by this court on appeal, nevertheless caused the dismissal of substantial federal claims found by the Missouri Cicuit Court. These errors are included in the statement of the questions presented by the appeal, hereinafter set forth. See Prudential Insurance Co. v. Cheek, 259 U.S.530 (1922).

Appellants on behalf of a class of four thousand members of the trucking industry were awarded judgments by the Circuit Court of Missouri based on the following violations

by the Missouri Highway Commission of the United States Constitution and Federal Law including the civil rights act.

1) The Imposition of Unconstitutional Burdens on Interstate Commerce.
2) Denial of Equal Protection under the Fourteenth Amendment.
3) Denial of Privileges and Immunities of Citizenship forbidden by Article IV, § 2.
4) Violation of the Due Process Clause of the Fourteenth Amendment.
5) Impairing the Obligations of Contract.
6) Violation of the interstate "Uniform Compact".

The Missouri Supreme Court does not dispute that these civil rights violations occurred. Rather the sole defense asserted to these violations by the Missouri Commission was sovereign immunity as the basis for the limitations of Section 136.035 R.S. Mo. 1969.

Before the Circuit Court of Missouri, appellants successfully argued that sovereign immunity and the application of Section 136.035 to Federal claims violated Aticle VI, Supremacy Clause, of the United States Constitution. (See Appendix A). The Missouri Supreme Court reversed and ordered on May 31, 1983 that the federal claims were limited by Section 136.035 in the following manner:

1) No class action on such claims was permitted although the unnamed members of the class had reasonably relied on the Missouri and Federal Rules of Civil Procedures which had authorized class actions and upon the holding of every lower Missouri court which considered this issue and specifically authorized class actions in this action.

2) The pendency of the class actions although reasonably filed and and relied upon by the unnamed members of the class and approved by the lower courts of Mis-

souri in this action does not toll the statute of limitations.

3) No interest (or apparently attorney fees) on the federal civil rights judgments would be paid although the state delayed payment of obvious overcharges which violated federal civil rights for thirteen years.

(Appendix B). No petition for rehearing was filed. Timely notice of appeal to this Court was filed in the Supreme Court of Missouri on August 25, 1983. As the Supreme Court of Missouri explicitly rejected appellants' challenge to Section 136.035, under the Supremacy Clause this matter is appropriately brought to this Court by appeal. See Sibron v. New York, 392 U.S. 40 (1968).

In the event that the Court does not consider appeal the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and

acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States: Article IV, Supremacy Clause; Unconstitiutional Burdens on Interstate Commerce, Impairing the Obligations of Contract, Article IV, § 2 Privileges and Immunities of Citizenship; and the Fourteenth Amendment, (Equal Protection; Due Process and Privilage and Immunity Clauses).

This case also involved the use of Section 136.035 (1) and (3) of Revised Statutes of Missouri to defeat federal claims against the state. That section provides:

"1. The director of revenue from funds appropriated, shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refund authorized by this section or by final judgment of court".

"3. No refund shall be made by the director of revenues unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded".

QUESTIONS FOR CONSIDERATION

1. Whether the Supreme Court of Missouri erred in asserting the sovereign immunity of Missouri to dismiss lower court judgments against the State based on Federal Constitutional Violations, Violations of an Interstate Compact, and Federal Civil Rights Violations.

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3. Whether the Supreme Court of Missouri erred in employing Section 136.035, R.S. Mo. 1969 as a local rule of practice to defeat or dimish federal claims as follows:

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c. By refusing to toll the two year statute of limitations by reason of the misrepresentation of Missouri officials found by the lower Missouri Court.

d. By failing to award interest on the federal claims.

STATEMENT OF THE CASE

BACKGROUND OF THE UNIFORM COMPACT

Prior to the signing of the Vehicle Re-

gistration Proration and Reciprocity Agreement (hereafter Uniform Compact), there was extensive conflict between the states concerning the taxation of commercial vehicles.

To resolve these conflicts 17 states and British Columbia entered into the Uniform Compact which sets out a fair allocation formula based on reasonable use of a state's highways. This allocation formula is referred to as the "total fleet miles formula" and is based upon the miles traveled within a state as the numerator and the total fleet miles traveled in all other states as the denominator. State ex rel Brady Motor Inc. v. State Tax Commission, 517 S.W.2d 133 (Mo. 1974).

On November 9, 1959, the Missouri Highway Reciprocity Commission entered in the Uniform Compact.

As noted below, by entering the Uniform Compact the state has submitted itself to federal law and to obligations rising out

of federal law.

VIOLATION OF THE UNIFORM COMPACT BY MISSOURI AS A RETALIATION TO IOWA'S ILLEGAL ACTION

The State of Iowa, initially by administrative action and subsequently by statute, violated the terms of the Uniform Compact to which it was a signatory and commenced charging Missouri carriers in excess of the total fleet mile formula. The Missouri Highway Commission, as shown by its minutes of June 25, 1965, decided to retaliate "to try and bring them (Iowa) back into line..." (Tr. 144, PL. Ex. 13, p. 26-32) State ex rel Brady Motor Ins. v. State Tax Commission, supra, at 135.

The Missouri Highway Reciprocity Commission commenced violating the provision of the Uniform Compact in three ways: overcharging truckers by use of a "Compact Rules Folumla", overcharging by the so-called "Gulick Gimmick"and by over and under charging some truckers by special deals. The

The details of such overchagres are irelevant here except to note that they are undisputed, and constitute clear violation of the Federal Constitution and the Federal Civil Rights Act, as found by the lower Missouri Courts and admitted by the Missouri Supereme Court.

These violations resulted in the following:

1. Irrational discrimination between different categories of carriers.

2. Discrimination between Missouri-based and non-Missouri based carriers. (PL. Ex. 13, p. 41-53)

3. Multiple taxation and discrimination between interstate carriers traveling in non-compact states who paid multiple taxes and carriers traveling intrastate or within compact states only which avoided such multiple taxation.

In 1967 the executive director of the Missouri Highway Commission represented to

attorneys for the plaintiff class that if Iowa was "straightened out" and forced to refund money to Missouri carriers, Missouri would give refunds to overcharged carriers without the necessity of filing litigation. These assurances were relied upon by the trucking industry. (Tr 59, PL. EX. 13, p. 67-68) In 1968 the Supreme Court of Iowa unanimously required the State of Iowa to honor its contractual agreement under the Uniform Compact and issued refunds to all carriers that had been overcharged, including Missouri carriers.

See:

Consolidated Freightways Corp. of Delaware v. Nicholas, 258 Iowa 115, 137 N.W.2d 900 (1965)

General Expressways, Inc. v. Iowa Reciprocity Board, 163 N.W.2d 413 (Iowa 1968)

The Missouri Commission, however, reneged on its promise, refusing to refund the overcharges to Iowa and other carriers, thereby

forcing the instant litigation.

PROCEDURAL HISTORY OF THE ACTION

A. ADMINISTRATIVE PROCEEDINGS.

Based upon the representations of the Missouri Reciprocity Commission that their claims would be paid when Iowa gave refunds to Missouri carriers, Ellsworth Freight Lines, Inc., Hirschback Motor Lines, Inc., and Kroblin Refrigerated Xpress Inc. individually, and on behalf of a class, filed claims for a refund of overpaid registration and license fees with the Department of Revenue in December, 1969. These claims are expressly based on Federal Civil Rights violation. The Department of Revenue held an administrative hearing on the matter on June 25, 1970, at which time evidence was heard and briefs and exhibits were presented. (Pl. Ex. 13) The Department then stalled appellees' claims without ruling for over three years while it decided the related Brady Motor claim within six months and

expedited a judicial determination and appeal in the Brady case.

On June 6, 1973, the Missoui Director denied the plaintiffs' refund request (PL. EX. 4,5 and 6). Claimants filed a petition for writ of Review on July 6, 1973. (PL. Ex. 8) By letter dated July 6, 1973, claimants were told by the State Tax Commission:

> "This is to acknowledge receipt of the above referred to petition and advise that all parties concerned will be notified of the time and place of hearing in ample time to appear for same." (Pl. Ex. 7)

No time and place was ever set by the Tax Commission for over five years prior to the Missouri Supreme Court opinion. Thus almost nine years elapsed without administrative action on the Truckers' petition prior to Missouri Supreme Court opinion in 1978.

B. FILING OF THE CURRENT COURT ACTION

When it became apparent that the Missouri Commission did not intend to honor its commitment to make refunds, eight Iowa

based trucking companies and two Missouri based trucking companies, on behalf of themselves and all other similarily situated, filed a lawsuit in the Circuit Court of Cole County against the Missoui Highways Reciprocity Commission.

C. THE CLASS ACTION DETERMINIATION

The claims for refund before the State Tax Commission as well as the Circuit Court litigation, were both filed as class actions. The facts establishing this as an appropriate class action are undisputed and established by the testimony of the Secretary of the Missouri Reciprocity Commission, as well as by plaintiffs' representatives.

Two judges of the circuit court upheld the instant action as a class action. Notice to more than 4,000 carriers pursuant to class action rulings were mailed (Tr. 88). Only a small number opted out of the case.

D. THE TRIAL OF THE ACTIONS BEFORE THE CIRCUIT COURT

The action was tried before the Circuit Court of Cole County on December 12, 1975. The Missouri Commission did not attempt to contradict the extensive evidence of constitutional violations and presented no witnesses on its behalf. Indeed the parties stipulated to the key facts and exhibits which established the federal causes of action (Tr. 102).*

E THE CIRCUIT COURT OF MISSOURI FOUND IN 1976 THAT THE MISSOURI RECIPROCITY COMMISSION VIOLATED THE UNITED STATES CONSTITUTION AND FEDERAL LAW, INCLUDING CIVIL RIGHTS VIOLATIONS.

The Missouri Circuit Court after a trial in November, 1976 found the following violations of the United States Constitution and Laws:

1. The Compact Miles Formula "did not bear a reasonable relationship to the

* The entire record in this case is relatively brief, consisting of 154 double spaced typewritten pages.

use of the Missouri Highways and resulted in many instances in double charges for the carrier". (Tr. 249)

2. The Gulick Gimmick charges on Missouri based carriers "did not bear a reasonable relationship to their use of the Missouri Highways, and such carriers were forced to pay double or more in numerous instances...." (Tr. 249)

3. "The above violations and each of them created an unreasonable burden on Interstate Commerce and violated the due process, equal protection and privileges and immunities of the plaintiff". (TR. 250)

4. "The actions by the Missouri Reciprocity Commission constitute a violation of the United States Constitution in imposing unreasonable burdens on interstate commerce, denials of the privileges and immunities of citizenship, violation of due process rights,

and denials of equal protection of the laws. Further, such violations contravene the constitutional prohibition against impairing the obligations of contract". (Tr. 254)

F. THE RULING OF THE MISSOURI SUPREME COURT

An appeal was taken directly by the Commission to the Missouri Supreme Court. The issue on the appeal was whether the Commission may require the use of administrative proceedings under Section 136.035 R.S. Mo.

In its opinion of July 24, 1978 the Missouri Supreme Court upheld the applicability of Section 136 to the truckers' claims and ordered that these matters must proceed exclusively before the Missouri Director of Revenue as refund claims.

The Missouri Supreme Court Opinion in 1978 did not rule on three key law issues:

1. Are class actions permitted on this

type of claim?

2. Does the pendency of a class action, even an invalid class action, toll the two-year statute of limitations; and

3. Is interest of 5% owing on such refund claims.

The Decision and Order of the State Tax Commission dated December 19, 1978 answered in the negative to these issues, and a petition for review before the Circuit Court of Cole County was appropriately filed.

G. JUDGMENT OF CIRCUIT COURT ON REVIEW OF THE STATE TAX COMMISSION ORDER

The Cole County Circuit Court entered its judgment on July 7, 1982 (Appendix A). The court below found that the Missouri Highway Reciprocity Commission had violated the Uniform Compact by not following the mileage formula therein when computing highway transportation fees and that the viola-

tion created an unreasonable burden on interstate commerce, and violated the due process, equal protection and privileges and immunities as well as the obligations of contract of the respondents (Appendix A, 1). The court below also found that class action was permissible or in the alternative that the statute of limitations should be tolled to allow other trucking companies to file claims for refund (Appendiz A). Finally, the court awarded interest of five percent on all monetary claims (Appendix A).

On August 31, 1982, a partial satisfaction of judgment was filed in the court below acknowledging payment of the overcharges without interest to the three named respondents for the two-year periods preceding their applications for refund (L.F. 36).

H. OPINION OF THE MISSOURI SUPREME COURT HEREIN

On May 31, 1983 the Missouri Supreme

Court, although not disputing that numerous violations of the United States Constitution and the Federal Civil Rights Act had occured, held that the states sovereign immunity permitted Missouri to defeat the federal rights by the imposition of various "procedural" conditions: (Appendix B)

1. No interest (or presumably attorney fees) was to be paid on the federal civil rights claims notwithstanding federal law to the contrary.
2. A special two year statute of limitations on refund claims was imposed although Missouri's five year statute of limitations governs constitutional violations § 516.120 R.S. Mo. 1969.
3. A class action was not permitted under the refund statutes of Missouri although the Missouri Supreme Court Rules and Federal Rules of Civil Procedure would authorize such a claim

and the lower Missouri courts had certified and given notice to the class. Thus the unnamed members of the class had their federal claims defeated although they had reasonably relied on the class action procedure.

4. The court let stand the State Tax Commission ruling that the pendency of the class action did not toll the two years statute of limitations and thus all federal claims by the unnamed members of the class are barred.

5. The court refused to toll the two-year statute of limitations on the federal claims because of the misrepresentations of Misssouri officials, although federal law is to the contrary.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Even if this case involed only the rights of the litigants, it is substantial in its impact. The undisputed federal claims of several thousand trucking firms have been

dismissed. These firms relied upon representations of the Missouri Commission that their class action claims would be honored without difficulty. After many years of stalling by the Missouri administrative agencies, the litigants are informed that class action claims will not be accepted, that the statute of limitations has run on their individual claims, that there is no tolling of claims by the pendency of class actions, and that their federal claims will be dismissed based upon the asseted sovereign immunity of Missouri. Such a result is contrary to the equities and federal law established by this court.

But the effect of this litigation is far broader than the rights of the litigants. Compacts between states have increasingly been used as methods of securing interstate cooperation to meet multi-state problems. If states are able to immunize or protect their own conduct in violation

of such compacts by asserting sovereign immunity or other procedural barriers to enforcement, the meaning and the use of such agreements will be greatly diminished.

Equally significant is the long range impact of this action on the enforcement of federal claims in state courts. If states are permitted to dismiss or qualify such claims against the state by use of sovereign immunity or local forms of practice, the use of concurrent jurisdiction in state courts will diminish and forum-shopping will result. Moreover, since federal claims asserted by a private litigant against a state itself must be brought in state court under the eleventh amendment, the result of the Missouri Supreme Court ruling is drastically to impair the assertion of all federal claims against a state.

Finally, the judgment of the Missouri

Supreme Court is erroneous and in conflict with substantial rulings of this court and United States Courts of Appeal, as shown by the following sections. Such significant conflicts should be resolved.

A. THERE IS NO SOVEREIGN IMMUNITY PROTECTING A STATE AGAINST SUITS BASED ON FEDERAL CONSTITUTIONAL VIOLATIONS OR VIOLATIONS OF INTERSTATE COMPACTS.

The sole defense in this action is the alleged sovereign immunity of the State of Missouri. That immunity, according to the Missouri Supreme Court, entitled the state to limit, condition and restrict the manner of presenting the claims herein in accordance with Chap. 136 R.S. Mo. 1969 and requires the exhaustion of administrative remedies under that chapter.

This holding is erroneous. There is no state sovereign immunity to violations of constitutional or other federally protected rights. By joining the United States,

a state makes the Constitution of the United States its own law which is supreme and cannot be impaired, qualified or conditioned by any concepts of state sovereign immunity. U.S. Constitution, Article VI, Supremacy Clause; McCulloch v. Maryland, 3 Wheat. 316 (1819)

See,

Bell v. Wolf, 496 F.2d 1252 (8th Cir. 1974), (In a civil rights action against a State Warden, the court held that a federally created cause of action cannot be restricted by state laws concerning official privilege or immunity.)

Hampton v. City of Chicago, 284 F.2d 602 (7th Cir. 1973), (Suits against Illinois state attorneys and others for violation of federal civil rights. Held state immunity defense has no application by reason of the supremacy clause.)

B. THE STATE OF MISSOURI MAY NOT QUALIFY OR CONDITION FEDERAL RIGHTS BY LOCAL RULES OF PRACTICE INCLUDING CHAPTER 136 RS MO 1969.

The supremacy clause and the absence of sovereign immunity means that local state forms of practice may not be applied

to qualify, condition or impair federally created rights brought in state courts.

In Dice v. Akron, Canton and Youngstown Railroad Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), this court held that all defenses in state court to federal causes of action are matters of Federal law. Moreover, state rules on jury versus judge determination were set aside as to a federal cause of action under the FELA tried in state court. In Davis v. Wechsler, 263 U.S. 22, 44 S. Ct. 13 68 L Ed. 143 (1923), the Supreme Court reversing Missouri courts held that a state could not apply local rules relating to waivers by general appearance in a federal law matter.

Under this doctrine, state pleading rules have been held inapplicable to Federal claims brought in state court.

See:

Wright v. State of George, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed,

2d 349 (1963)

State rules requiring the filing of claims as a prerequisite to litigation and applying state limitations periods are inapplicable to federal rights brought in state court.

See:

Cox v. Roth, 348 U.S. 207, 75 S. Ct. 242, 99 L Ed. 260 (1955), (Action under Jones Act against estates in which no notice of claim had been filed as required by local Florida law. Held the state requirements relating to estates cannot effect or diminish the period of filing Federal Jones Act claims.)

Williams v. Horvath, 16 Cal. 3d 834, 548 Pac.2d 1125 (1976) (California requirement that tort claims against state or other governmental entities be filed with appropriate administrative agency within 100 days of accrual of cause of action held not constitutionally permissible against Federal Civil Rights claims in state court.)

See Also:

Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970); (holdings to same effect as Williams v. Horvath.)

Local rules on interest on judgments do not govern claims on federal rights brought in state court.

See:

> Board of Com'rs of Jackson County, Kan v. United States, 308 U.S. 343, 60 S Ct. 285, 84 L.Ed. 313 (1939) (In determining the rights of Indians under U.S. Treaties, the local Kansas law forbidding interest on any improperly collected taxes will not be followed - federal law must govern...nor "are the federal courts restricted to the remedies available in state courts in enforcing such federal rights..." (308 U.S. at 350-1)).

In short, a state by reason of the supremacy clause may not condition, burden or in any manner control federal rights.

See:

> Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S. Ct. 362, 19 L. Ed.2d 438 (1967), (Florida's refusal to pay unemployment insurance to persons who preferred unfair labor practice charges against former employer held invalid. Citing Mc Culloch v. Maryland, the court declared the states devoid of power "to retard, impede, burden, or in any manner control ..." the constitution and laws of the United States (389 U.S. at 240))

The above principles govern not only the constitutional violations found by the lower court but also the claims for violation of the Uniform Compact.

By signing the Uniform Proration and Registration Compact, the State of Missouri entered into interstate relationships and interstate commerce which are subject to the regulation and control of the federal government. It has long been held that all such interstate agreements (including any defenses thereto) and state activities within the area of interstate commerce are governed by federal, not state law.

See:

Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275, 79 S. Ct. 785, 3 L.Ed.2d 804 (1958)

Parden v. Terminal Railway of the Alabama State Docks Department, 337 U.S. 184, 84 S. Ct. 1207, 12 L.Ed.2d 233 (1964)

Ladue Local Lines, Inc. v. Bi-

State Development Agency of the Missouri-Illinois Metropolitan District, 433 F.2d 131 (8th Cir. 1970)

C. A CLASS ACTION IS PROPER IN THIS ACTION UNDER THE APPROPRIATE FEDERAL LAW WHICH MUST GOVERN.

As noted above, federal law governs this case and class actions are proper thereunder. At the time of the hearing on the class action issue, the lower Missouri court received overwhelming and indeed uncontroverted evidence favoring the plaintiffs on each of the elements of an appropriate class action pursuant to Federal Rule 23 and the Missouri Supreme Court Rule 52.08. The court entered findings favorable to the plaintiff and ruled that it was a proper class action. Subsequently, notice was sent to all members of the class notifying them of the pendency and binding character of the action and permitting them to opt out if they desired.

It is clear that class actions have been sustained enforcing federal law. Class actions have been sustained which pertain to taxation, and various other aspects of federal funding programs. For example a class action was held proper in a suit to enjoin jeopardy assessments and income tax levies, and for tax refunds. Lewis v. Sandler, 498 F.2d 395 (9th Cir.).

State courts must permit the use of the federal class action procedure to remedy violation of federal constitutional law or to enforce federal rights. In addition to the cases cited under Point II, A and B above, the Wyoming Supreme Court has upheld a class action by licensed beer wholesalers of the state to declare a sales tax statute unconstitutional, and to hold all members of the class entitled to repayment of the impounded exaction.s Hansen v. Smith, 395 P.2d 644 (1964).

The California Supreme Court held that the state court was obliged to give effect to an Act of Congress which dealt with interests within the state in Javor v. State Board of Equalization, 12 c.3d 790, 527 P.2d 1153, 117 Cal, Repr. 305 (1974). Here a class action was proper in a suit in state court to obtain refunds of federal excise tax collected by the state, when the bill authorizing such collection was repealed retroactively by Congress. The court held:

> "...it was left to the courts to define the rights of the parties in this respect and to adopt appropriate remedies. It is still left to the courts to adopt appropriate remedies when excessive reimbursements have been collected by mistake and paid to the state." 527 P.2d at 115.9

It is thus clear that state courts must recognize and give effect to federal class action requirements.

D. ANY STATUTE OF LIMITATIONS IS TOLLED BY THE FILING OF A CLASS ACTION AND PRINCIPLES OF ESTOPPEL BASED ON MISREPRESENTATIONS.

The overwhelming weight of authority, both federal and state, holds that the filing of a class action, even if the class action is subsequently declared invalid, tolls the statute of limitations as to all members of the class. The reason for the rule was well stated by Judge Frank in York v. Guaranteed Trust Co. (2d Cir. 1944), 143 F.2d 503, rev'd on other grounds, 326 U.S. 99 (1949) as follows:

> "It would be stange anomaly in the law if it should allow an action to be brought for a party, and he should thus be encouraged to rely upon it, and not seek legal redress otherwise then by it, and yet when he came, in the course of his action, to prove his debt, and share in the fund, to treat him as having, by such reliance, lost it by the lapse of time, happening after the bringing of the action. The law will not mislead -- it is just and faithful, and will not tolerate, much less uphold, a rule of practice that works such injustice and absurdity."

This issue was laid to rest in a defin-

itive opinion by the United State Supreme Court in American Pipe Constr. Co. v. Utah, 414 U.S. 539 at 551, 94S.Ct. 756, 38 L.Ed.2d at 725 (1974). The court stated:

> "Thus the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary, would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties -- precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy...'"

The court held that the tolling of the statute of limitations applied even to those who were unaware of the filing of the class action suit, and therefore did not rely on the institution of the proceedings.

The court then further held that even in the case before it, where the district court ordered the suit could not continue as a class action, the statute of limitations was tolled by the allegations that it was an appropriate class action. Any other rule the court emphazised would force potential class members to file protective motions to intervene or to join in the event that the class was later found unsuitable thereby defeating the basic considerations leading to class actions. The court then concluded:

> "We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all assorted members of the class who would have been parties, had a suit been permitted to continue as a class action."

The court then noted that even if the case is decided not to be class action case, a reasonable period of time must be given to intervene after such a ruling in

light of the rule that the statute of limitations is tolled.

As noted by the cases cited under Point II above, the federal law on tolling of limitations is applicable. An additional case which is directly on point is Mizell v. North Broward Hospital District, 427 F. 2d 468 (5th Cir. 1970) which held that federal rules on tolling must be applied to state statutes of limitation in connection with federal law cases.

> "Having in mind the salutary rule that under our system of federalism aggrieved person should be encouraged to utilize state procedures before appealing to the federal courts of Henry v. Mississippi, 379 U.S. 443, 452, 453, 85 S.Ct. 564, 13 L.Ed.2d 408, we are persuaded that in cases arising under the constitution or laws of the United States, a federal rule or tolling a state statute of limitations (where applicable) should be observed if such rule clearly carries out the intent of Congress or the constitutional principle at stake."

There are not Missoui cases to the contrary. By precedent and by reason of the

governing law, the filing of the class action in this matter in 1969 acted to toll the statute of limitations for all members of the class.

Moreover, the federal law is that a promise or representation which induces delay in the filing of claims operates to toll the limitations period under principles of estoppel. Tucker v. Owen, 94 F.2d. 49 (5th Cir.) The court below found such promises misrepresentations and reliance occured in 1967. (Appendix A)

E. DUE PROCESS WOULD BE VIOLATED IF THIS COURT FAILS AT LEAST TO TOLL THE STATUTE OF LIMITATIONS BY REASON OF THE PENDENCY OF THE CLASS ACTION.

These matters were originally filed as class actions before the Missouri Reciprocity Commission on December 8, 1969 and in the Circuit Court of Cole County, Missouri on October 20, 1970. The Circuit Court held this was an appropriate class action and gave notice to members of the class.

The Missouri case of Charles v. Spradling, determined by the Missouri Supreme Court to deny a class action was not decided until 1975, after the statute of limitations had run in this action. (Appendix B).

Prior to that decision, the members of the class relied upon the circuit court's ruling and the Federal and Missouri's Supreme Court Rules authorizing class actions in failing to file individual claims. See the Amicus Curiae Brief to the Missouri Circuit Court of Rocor Internationa. (Appendix C)

Rocor International and other unnamed members of the class reasonable relied on the pendency of the class action litigation to protect their federal rights. If a court fails to toll the limitations period, these parties have been prejudicially misled and denied rights in violation of due process as found by the

Missouri Circuit Court:

> "Moreover, under the facts of this case, it would be denial of due process to fail to toll limitations by the filing of the class claims for refund."

F. FEDERAL LAW GOVERNING INTEREST (AND ATTORNEY FEES) ON FEDERAL CLAIMS IS CONTROLLING.

Federal law governing interest on Federal claims is likewise controlling and cannot be denied by a state asserting sovereign immunity, particularly when the state authorities have stalled the proceedings to prevent payment of damages and interest. Federal, not state law governs the granting of interest.

See:

> Board of Com'rs of Jackson County Kan V. United States, 308 U.S. 343 60 S. Ct. 285, 84 L. Ed. 313 (1939); Federal Law specifically authorizes such interest: Title 28 Section 1961.

The equities strongly dictate that interest should be awarded herein. These monies were paid to the state of Missouri

in 1967-1972 and illegally retained by the state for over thirteen years. The records of misrepresentations to the trucking industry and the stalling by the Commission are part of the finding of fact in the Circuit Court. (Appendix A)

Plaintiffs have done everything within their power to assert their rights under sections 136.035 and 138.430. A claim for a refund of overpaid registration and license fees was filed with the Department of Revenue in December, 1969. (Pl.Ex.9, 10, 11) The department of Revenue held an administrative hearing on the matter on June 25, 1970, at which time evidence was heard and briefs and exhibits were presented. The Department took the plaintiffs claims under advisement for over three years while it decided the related Brady Motor claim within six months and commenced various legal maneuvers.

On June 6, 1973, plaintiffs were notified that their refund claim was denied. Claimants filed a Petition for writ of Review on July 6, 1973. By letter dated July 6, 1973, claimants were told by the State Tax Commission:

> "This is to acknowledge receipt of the above referred to petition and advise that all parties concerned will be notified of the time and place of hearing in ample time to appear for same." (Pl. Ex. 7)

No time and place was set by the Commission and over five and one half more years elapsed.

Even after finding the money was due in 1979, the Commission delayed three additional years before the actual payment was made. Payment occurred in 1982 eight years after the Missouri Supreme Court found such collection illegal in the Brady Case, supra.

Thirteen years of such tactics should not be rewarded by a denial of an interest award. The appellants have not only lost

the use of their money during such periods, but the value of the original money had diminished by inflation to a point where a five percent interest award per annum will not even restore the fund to its original value.

The stalling tactics by the State of Missouri, the clear violations of federal rights as well as the misrepresentations by Missouri officials to defeat such rights create compelling equities for the application of federal law in this case.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions presented are substantial. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF COLE COUNTY,

MISSOURI

STATE OF MISSOURI, ex rel. ELLSWORTH

PLAINTIFF,

vs.

STATE TAX COMMISSION OF MISSOURI

DEFENDANT-RESPONDENTS

NO. CV 179-28

DIVISION 2

FINDINGS OF FACT, CONCLUSIONS OF

LAW AND JUDGMENT FINDINGS OF FACT

The Court makes the following findings of fact:

(1) On or about the 9th day of November, 1959, by virtue of the provisions of Section 301.277 R.S.Mo. 1959, The Missouri Highway Reciprocity Commission entered into an

agreement with several of the states providing for the reciprocity and sharing of licensing fees of commercial vehicles, such agreement being denominated and known as the "Uniform Vehicle Registration Proration and Reciprocity Agreement", herein referred to as the Uniform Compact.

(2) The Uniform Compact had as its purpose the avoiding of unreasonable burdens on interstate commerce by providing for a fair allocation of registration fees. A further purpose and intent was to provide uniform standards which would inure to the benefit of the trucking industry including plaintiffs herein. Bridge states such as Missouri, through which truckers passed without their necessarily being based in the state, were benefited by the Uniform Compact formula which allocated a portion of registration fees to the states according to the use of the highways in such state. The

compact was also devised to eliminate the elusive concept of "residency" or "basing point" of an interstate trucker as a determinate of fees. To this end, the formula for allocation of registration fees provided in the contract was as follows: Miles traveled in state as the numerator over total fleet miles traveled in all states as the denominator (hereinafter the total fleet mile formula). No distinction was made in the compact between vehicles that were base-plated within the state of Missouri, or base-plated elsewhere.

(3) The State of Iowa, initially by administrative action and subsequently by statute, violated the terms of the Uniform Compact to which it was a signatory and commenced charging Missouri carriers in excess of the uniform compact formula. The Missouri Highway Commission, as shown by its minutes of June 25, 1965, decided to retaliate "to try and bring them (Iowa) back

into line...."

The MIssouri Highway Reciprocity Commision commenced violating in three ways the provisions fo the Uniform Compact.

A. From 1966 until approximately 1972, Missouri enforced a so-called compact miles formula against carriers which were based in Iowa, South Dakota, North Dakota or other compact states. Under this formula the numerator was miles traveled in Missouri but the denominator included only the miles traveled in states which were parties to the interstate compact. In other words, miles traveled in interstate commerce in states that were not parties to the uniform compact were not permitted to be added to the denoinator. The result was an overcharge to the carrier in violation of the uniform compact. The illegality of this overcharge was decalred in the case of Brady Motor Frate, Inc., et al. v. The State Tax Commission of the State of Missouri, No. 25948, by the Supreme

Court of Missouri. Refusing to give credit in the formula for miles traveled in states outside the Uniform Compact, meant that the charges did not bear a reasonable relationship to the use of Missouri highways and resulted in many instances in double charges for the carriers since they were also required to pay fees of various types in states that were not parties to the Uniform Compact.

B. The second violation of the Uniform Compact was in the use of the so-called "Gulick Gimmick" which was imposed on Missouri based carriers. Under the Gulick Gimmick the Missouri based carrier was required to add to its numerator all miles traveled in states not a party to the Uniform Compact. The denominator was made up of total miles traveled in all states. The carrier gave credit to Missouri and paid charges for miles traveled in interstate commerce in numerous states to the east and

south of Missouri which were not members of the compact. These charges imposed on the Missouri based carriers did not bear a reasonable relationship to their use of the Missouri highways, and such carriers were forced to pay double or more in numerous instances because of special fees imposed upon them by the non-compact states.

C. The third violation of the Uniform Compact consisted in special allocation deals granted by the defendants to preferred carriers, who by reason of buying a certain number of license plates for vehicles or other payments, were then excused from the proration formula of the Uniform Compact.

The above violations and each of them created an unreasonable burden on interstate commerce, and violated the due process, equal protection, and privileges and immunities of the plaintiffs.

(4) In 1967 the executive director of

the Missouri Highway Commission represented to the attorneys for the plaintiff class of highway carriers, that if Iowa was "straightened out" and forced to refund money to the Missouri carriers, that Missouri would do the same without the necessity of filing litigation. These assurances were relied upon by the trucking industry which then continued in its legal action against the State of Iowa. (See testimony of June 22, 1973.) In 1968 and 1969, the Supreme Court of Iowa unanimously required the State of Iowa to honor its contractual agreement under the Uniform Compact and issue refunds to all carriers that had been overcharged, including Missouri carriers.

(5) Plaintiffs Ellsworth Freight Line, Inc., Hirschback Motor Lines, Inc., and Kroblin Refrigerated Express, Inc. filed application for refund on behalf of the total group of carriers who had been over-

charged with the Missouri Reciprocity Commission, on or about December 8, 1969. This application alleged that the activities of the Missouri Reciprocity Commission violated various federal constitutional and statutory rights which are encompassed within the Federal Civil Rights Act 74 U.S. C. 1981-83. These claims are hereby construed as an attempt to enforce Federal Civil Rights within the terms of such statutes. A hearing on said refund application was held on June 25, 1970. Approximately three years later, the Missouri Director of Revenue denied the refund request for the individual plaintiffs, without specifically ruling on the class action refund claim. (Plaintiff's Exhibits 4,5, and 6.)

(6) On July 6, 1973, Plaintiffs filed a Petition for Writ of Review (Exhibit 8) and thereupon received from representatives of the State Tax Commission, a letter stating

that the matter would be set for a hearing and plaintiffs would be notified. (Plaintiffs' Exhibit 7.)

(7) A further action was filed on October 26, 1970, in the Circuit Court of Cole County, Missouri, No 25027, as a class action. This complaint also alleged that the activities of the Missouri Reciprocity Commission violated various federal constitutional and statutory rights which are encompassed within the Federal Civil Rights Act 42 U.S.C. 1981-83. This complaint was a further attempt to enforce Federal Civil Rights within the meaning of such statutes. A hearing on the class action motion was held on June 22, 1973 and approval was granted by this court for this matter to be conducted as a class action. The earlier findings confirming this action are hereby reaffirmed by this order. Appropriate notice to the class members and opportunity to opt out of the class was

given in June, 1975, The vast majority of the class members chose to remain in the class.

(8) The Circuit Court of Cole County, Missouri held a trial on this case in December, 1975. A decision was tendered for the plaintiffs and appropriate Findings of Fact, and Conclusions of Law and Judgment were entered on November 29, 1976, which Findings and Conclusions are attached hereto as Exhibit A. These earlier findings are hereby reaffirmed by this order.

(9) The Missouri Supreme Court held on its opinion filed July 24, 1978 that the two year statute of limitations required by Section 136.035 R.S. Mo. was applicable and that these matters must proceed exclusively before the Missouri Director of Revenue as refund claims. The original Circuit Court action was therefore dismissed.

(10) The Missouri Supreme Court Opinion

does not rule on certain key law issues:

A. Are class actions permitted on this type of claim?

B. Does the pendency of a class action, even an invalid class action, toll the two year statute of limitations;

C. Is interest of 5% owing on such refund claims; and

D. Are plaintiffs entitled to legal fees under the Federal Civil Rights Act?

(11) The Decision and Order of the State Tax Commission dated December 19, 1978 answered in the negative to each of these issues and the instant petition for review was appropriately filed. The prior record and evidence which were before the Circuit Court in 1976 were incorporated by stipulation before the State Tax Commission.

(12) This Court previously entered Findings of Fact and Conclusions of Law in the related case No. 25027 upholding this

matter as a class action. These findings are hereby reaffirmed. This action is appropriately and properly conducted as a class action pursuant to the applicable Missouri statutes and Supreme Court Rules as well as the Federal Rules.

(13) In the alternative, if in any event, this matter should subsequently be held not to be an appropriate class action, this Court concludes that the filing of the claim for refund on behalf of the class in December, 1969, operates to toll any Statutes of Limitations applicable to the filing of such claims and the alleged members of the class will be granted by this Court a reasonable time within which to intervene in this action and before the State Tax Commission to file appropr ate claims for refund. Moreover, under the facts of this case, it would be a denial of due process to fail to toll limitations by the filing of the class claims for refund.

(14) In view of the circumstances of this case, the Court hereby awards interest of five percent (5%) on the claims to be filed in this matter.

(15) THE AMOUNTS OF THE CLAIMS AWARDED BY THE STATE TAX COMMISSION ARE ERRONEOUS.

In its order of December 19, 1978 the commission in setting the amounts involved failed to consider the Supplemental Refund Request Affidavit of June 5, 1970. After this petition for review was filed, the Commission without notice, hearing, jurisdiction or authority entered an Order Nunc Pro Tunc dated June 13, 1979 which awarded the correct additional amounts for two of the petitioners, Kroblin and Ellsworth, but reduced the amount to be awarded to Hirschbeck Motor Lines, Inc.

(16) All parties now agree that the following are the correct amounts to be awarded two of the petitioners:

Kroblin Refrigerated Xpress, Inc.

$6,493.69

Ellsworth Freight Lines, Inc.

$6,113.11

(17) THE HIRSCHBACK CLAIM IN THE AMOUNT OF $43,143.56 SHOULD BE AWARDED FOR THE FOLLOWING REASONS.

Section 136.035 (3) of the Revised Statutes of Missouri provides:

A. "3. No Refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment..."

B. On or about December 9, 1969 Hirschback submitted a refund request affidavit . Hirschback is thus entitled to receive all payments made after December 9th, 1967.

C. The total overcharges paid for the year 1968 by Hirschback total $19,616.43 and for the year 1969 total $21,194.92.

The supplemental affidavit establishes additional 1969 overcharges in the amount of $2,332.21. Thus the total owing to Hirschback should be $43,143.56 (without interest). [See Exhibits C and D to Trial Brief]

D. Throughout all the proceedings, until June 1979, this amount of $43,143.56 was accepted by all the parties as the correct amount owing if a two year limitations is applied.

E. At the hearing of June 25, 1970 before the Department of Revenue, these amounts were stipulated as correct by the department (see pages 35 and 36 of Plaintiff Exhibit 13).

F. At the trial of these matters before the Circuit Court of Cole County on December 10, 1975, the parties entered into a stipulation as to the correctness of the refund request affidavits (see

page 104 of the Transcript in the Supreme Court of Missouri).

G. Pursuant to these stipulations, the Circuit Court of Cole County entered the following findings of fact number (9) (b):

"(a) The refund affidavits of three of the plaintiffs, without objection from the defendants, established the following total overcharges since 1966:

(b) Hirschback Motor Lines, Inc., $78,478.73 (of which $35,310.17 were overcharges for the year 1966 and 1967(." (Page 148 of Transcript before Supreme Court)

Then this court adjudged that such amounts should be paid to Hirschback (page 151 of transcript before Supreme Court).

H. Before the State Tax Commission the

parties entered into a further written stipulation:

> "3. The dollar amounts claimed as overpayments for the years in question as stated in Exhibits A and B. [The refund affidavits which are Exhibits C and D herein] can be considered as accurate for purposes of a decision by the tax commission on the controversy in question. In all cases where the actual date of payment for such amounts is not listed, it is stipulated and agreed between the parties that the date of payment for each given tax year is on or about the first day of January, or dates subsequent to that date, of each given year."

The refund affidavits which are Exhibits C and D do not list payment date for Hirschbeck, only the "check date" is

described. Thus the parties Stipulated that the payments were made on or about the first day of January.

I. The State Tax Commission in its Decision and Order dated December 19, 1978 ruled as follows:

"Respondent is liable to Complaintant Hirschback Motor Lines, Inc., in the amount of $19,616.43 on the 1968 tax year and $21, 194.92 for the tax year 1969." These amounts are correct except the State Tax Commission failed to include the additional amount of $2,332.21 established by the Supplemental refund affidavit. The instant Petition for Review was promptly filed.

J. Many months after the Petition for Review was filed and the State Tax Commission no longer had authority, the Commission ex parte entered an Order Nunc Pro Tunc which purports

to reduce the liability to Hirschback to $27,689.98.

K. The reduction is based on the failure to credit Hirschback with its original check, number 398, check date 12/6/67 which contains an overpayment of $15,453.58. The contention of the respondents is that since the check was "dated" 12/6/67, the date of "payment" necessarily occurred more than two years prior to filing the refund affidavit. Such contention is rejected for the following reasons:

(1) The contentions ignore the prior stipulations of the parties and rulings of this Court. No additional evidence was introduced on the actual date of payment and the Nunc Pro Tunc order was entered ex parte by the Commission after the appeal had been taken.

(2) The contention is contrary to the facts. The check in question, although

dated December 6, 1967, was clearly designated 1968 Prorate taxes. It was not due until January 1, 1968. The long standing policy of the Missouri Department of Revenue of which this Court takes judicial notice is to record and cash checks within a week of the date received and the parties so stipulated to this fact. The check in question was not received by the Missouri Highway Commission as shown by the stamp on its back until January 7, 1968. Respondents have introduced nothing in the record to suggest that this check was either received or cashed by them prior to the two year period. The stipulations and evidence are to the contrary. Only the receipt and cashing of a check constitutes "payment". The mere fact of the check date does not establish date of payment.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

(1) The Uniform Compact which was entered into by the Missouri Highway Reciprocity Commission, on or about November 9, 1959, is a valid and binding obligation of the State of Missouri and of the other states which are parties to said agreement. Plaintiffs herein are third party beneficiaries of said agreement and have standing to bring this action.

(2) The use of the Missouri Highway Commission of the compact miles formula and the Gulick Gimmick, is a breach of such agreement and unauthorized, invalid and unlawful. Overcharges by the State of Missouri pursuant to such violations to not bear a reasonable relationship to the use of Missouri highways, and constitute

an unreasonable burden on interstate commerce, a denial of the privileges and immunities of citizenship and of due process, and a denial of equal protection of the plaintiff class and are thereby a denial of plaintiffs' federal civil rights. These refunds were appropriately and properly filed as a class action refund pursuant to the applicable Missouri statutes and Supreme Court rules.

(3) In the alternative, if in any event, this matter should subsequently be held not to be an appropriate class action, this Court concludes that the filing of the claim for refund on behalf of the class in December, 1969, operates to toll any Statutes of Limitations applicable to the filing of such claims and the alleged members of the class will be granted by this Court a reasonable time within which to intervene in this action and before the

State Tax Commission to file appropriate claims for refund. Moreover, under the facts of this case, it would be a denial of due process to fail to toll limitations by the filing of the class claims for refund.

(4) The actions by the Missouri Reciprocity Commission constitutes a violation of the United States Constitution in imposing unreasonable burdens on interstate commerce, denials of the privileges and immunities of citizenship, violation of due process rights, and denials of equal protection of the laws. Further, such violations contravene the constitutional prohibition against impairing the obligations of contract. Thus, the Plaintiffs' civil rights have been violated.

JUDGEMENT AND DECREE

It is therefore ordered adjuged and decreed

that refunds be paid to the following named plaintiffs in the amounts set forth by each of their names, together with interest thereon from December 8, 1969.

1. Kroblin Refrigerated Xpress, Inc. $6,493.69. (plus interest of 5% from December 9, 1969).

2. Ellsworth Freight Lines, Inc., $6,113.11 (plus interest of 5% from December 9, 1969).

3. Hirschback Motor Lines, Inc. $43,143.56. (plus interest of 5% from December 9, 1969).

Plaintiffs' request for legal fees pursuant to the Federal Civil Rights Statute is granted and attorneys fees in the amount of is hereby awarded to plaintiffs.

APPENDIX B

SUPREME COURT OF MISSOURI

State of Missouri ex rel.
ELLSWORTH FREIGHT LINES, INC.,
a Corporation; HIRSCHBACH MOTOR
LINES, INC., a Corporation; and
KROBLIN REFRIGERATOR XPRESS, INC.,
a Corporation, and all other
trucking companies similarly
situated,

Plaintiffs-Respondents,

vs.

STATE TAX COMMISSION
OF MISSOURI,

Defendant-Appellant.

NO. 64266

APPEAL FROM THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

Honorable Byron L. Kinder, Judge

The issues presented in this appeal are (1) whether recovery of overpayment of motor vehicle registration fees may be sought by a class action; (2) if not, whether the filing of a class action would toll the statute of limitations on the claims of the members of the class who were not named parties; and (3) whether interest should be allowed when over-assessed motor vehicle registration fees are refunded. This court has jurisdiction as the appeal involves construction of the revenue laws. Mo. Const. Art. V § 3.

On December 16, 1969, respondents filed a claim with the Missouri Department of Revenue, seeking a refund of motor vehicle registration and license fees for 1960 through 1969, on behalf of themselves and a class of "aggrieved truckers". They also requested interest at the rate of 6% on the overpayments.

The refunds were sought on the basis of improper computation and assessment of registration fees by the Missouri Highway Reciprocity Commission. This court has ruled that during the period in question the Missouri Highway Reciprocity Commission violated the Vehicle Registration Proration and Reciprocity Agreement and certain carriers were charged excessive fees. See State ex rel. Brady Motorfreight, Inc. v. State Tax Commission, 517 S.W.2d 133 (Mo 1974). The registration fees are taxes upon the privilege of operating motor vehicles on Missouri highways. Transport Rentals, Inc. v. Carpenter, 325 S.W.2d 745, 749 (Mo. 1959).

On October 26, 1970, respondents also sought the overpayments and other relief in an action filed in behalf of themselves "and all other similarly situated" in the Circuit Court of Cole County

against the Missouri Highway Reciprocity Commission and others. That action also alleged that the Director of the Department of Revenue "has refused to honor... claims as to those not named as parties" to the December 16, 1969, claim. On June 6, 1973, the Director of the Department of Revenue denied the December 16, 1969, claim and respondents then petitioned the State Tax Commission to review that denial.

On July 24, 1978, this court determinted that the action initiated in the circuit court did not lie as the respondents must pursue the refunds through the administrative remedies provided by statue. That action was ordered dismissed "without prejudice to the right to proceed furhter under §§ 136.035 and 138.430 and Rules 100.03 to 100.07, inclusive." Ellsworth Freight Lines v. Missouri Highway Reciprocity Commission, 568 S.W.2d

521, 525 (Mo banc 1978), cert. denied 400 U.S. 901 (1979). The court noting "that unreasonable delay on the part of the State Tax Commission in making a decision on plaintiffs' refund requests may be grounds for an order of the Circuit Court either compelling action by the State Tax Commission or removing the case to the court for decision. Rule 100.03." 568 S.W.2d at 525. No remedy because of delay was ever sought by respondents.

On December 19, 1978, the State Tax Commission ruled that the two year statute of limitations contained in § 136.035.3, RSMo 1978, was applicable and denied any claims for refund based upon payments made before December 16, 1967. It determined that Ellsworth Freight Lines, Inc., and Hirschback Motor Lines, Inc. were entitled to refunds but that Kroblin Refrigerator Xpress, Inc. was not because of the two year

statute of limitations. It also ruled that respondents could not seek a refund for others as a class action and that interest could not be recovered. Respondents then sought judicial review before the Ciruit Court of Cole County.

On July 7, 1982, the circuit court ruled that respondents could properly seek a refund for others as a class action but if it was subsequently held that a class action was not appropriate "that the filing of the claim for refund on behalf of the class in December, 1969, operates to toll any Statutues of Limitations applicable to the filing of such claims". It determined that respondents were entitled to interest on the overpayments at 5% from December 8, 1969. It also increased the amount due to Ellsworth Freight Lines, Inc. and Hirschback Motor Lines, Inc. and allowed a refund to

Kroblin Refrigerator Xpress, Inc. All amounts found due, except interest, were for overpayment for the two years immediately preceding the filing of the claim for refund.

The State Tax Commission appeals, contending that the circuit court erred as no class action is permitted; that its filing does not toll the two year statute of limitation; and that interest on the refunds should not be ordered. No contention is made here that the principal amounts found due by the circuit court were improper. A partical satisfaction of judgment was filed on August 31, 1982, showing that respondents were refunded the principal amounts as ordered by the circuit court.

We first discuss whether the class action was proper. Respondents contend that they are entittled under Missouri

law to bring a class action and even if Missouri law does not allow such an action they are entitled to bring it under federal procedure because the Missouri Reciprocity Commission violated the United States Constitution and the Vehicle Registration Proration and Reciprocity Agreement. Respondents assert that "valid federal claims" are involved and both federal substantive and procedural law must be followed.

We do not agree that Missouri law allows a class action as sought here. Charles v. Spradling, 524 S.W.2d 820 (Mo banc 1975), held that a class action cannot be used to claim refund of improperly collected sales taxes. Respondents attempt to distinguish it because § 144.190.2, RSMo 1969, requires claim to be brought by each "person". That was not the basis of the holding. It held

that as § 144.190 specified the method by which sales tax refund claims may be made, as there was no provisions there that they could be claimed on behalf of a class of taxpayers, the state had not consented to be sued in such a manner. That holding is applicable here. Section 136.035, RSMo 1978, provides the Missouri procedure for the initiation of claims for refunds of the fees paid here. That section does not authorize a class action and therefore, under Missouri law one may not be maintained here.

Respondents argue that the Administrative Procedure Act, § 536.067(1), RSMo 1978, provides for class actions. This does not help the respondents. The jurisdiction of the State Tax Commission was predicated on § 138.430, RSMo 1969. In force at the time the review was sought, but now repealed. The

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Commission's jurisdiction is limited to the "finding, order, decision...." of the Director of Revenue which was sought to be appealed and, as demonstrated above, § 136.035 does not authorize a claim for refund on behalf of a class. The recognition of class actions in § 536.067(1), moreover, is discretionary with the administrative tributal, and the State Tax Commission exercised its discretion against the recognition of the class action.

Respondents contend that this cause involves "federal rights" and is governed by federal procedure because the Missouri Reciprocity Commission violated the United States Constitution by unconstitutionally burdening interstate commerce, violating the equal protection clause of the Four-

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teenth Amendment, violating the privi-ledges and immunities of citizens of other states, violating the due process clause of the Fourteenth Amendment, and contravening the constitutional prohibition against impairing the obligation of contract. Respondents also contend that the violation of the Missouri Highway Reciprocity Commission of the Vehicle Registration Proration and Reciprocity Agreement gives rise to "federal rights" and thus federal procedures apply.

These arguments were answered in the prior Ellsworth case. The court stated that even where constitutional claims or other "federal rights" are involved, a state may require that its procedures be followed as long as those rights are not defeated under the name of local practice. 388 S.W.2d at 524-525. See also Brady, supra, 517 S.W.2d at 137-138. The absence of a class action does not defeat those

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rights. No carrier's rights are defeated by following § 136.035. While a class action may be more convenient, its absence certainly does not prevent any claimant from filing a claim and seeking a refund under § 136.035. The respondents did so successfully for themselves here, as did the claimants in Brady.

Respondents also contend that the Missouri Highway Reciprocity Commission's violation of the Vehicle Registration Proration and Reciprocity Agreement "gives rise to 'federal' claims, to which sovereign immunity is not a defense." They contend that absent sovereign immunity Missouri cannot limit the manner of bringing suit. This contention is answered in Brady. "The statutes creating the highway reciprocity commission and giving it certain powers and responsibilities do not expressly or by implication abrogate or repeal the preexisting statutory procedures

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for refund of overpaid taxes". 517 S.W.2d at 138. Respondents must follow § 136.035, and as it does not provide for a class action, none is allowed.

Whether the filing of a class action would toll the statute of limitations does not affect any of the named respondents. It only affects those members of the purported class not named. Whether the statute of limitations should be tolled because of an improper class action would only be relevant in determining the claims of those carriers. Determining that issue now would be an advisory opinion for entities not proper parties to this suit. The supreme court does not render advisory opinions. In the Matter of the Estate of Van Cleve, 574 S.W.2d 375, 376 (Mo banc 1978). As a class action is not proper, respondents are before this court in their individual capacities only and our review is limited to the trial court's judgment as it affects

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them individually. See Moore v. City of Pacific, 534 S.W.2d 486, 493-494 (Mo.App. 1976). An appellate court opinion should be limited to those questions essential to a proper dispostion of the appeal. Kestner v. Jakobe, 412 S.W.2d 205, 207 (Mo. App. 1967). Whether the statute of limitations is tolled is not properly before this court nor essential to the proper disposition of this appeal.

We now discuss whether interest was properly awarded. Respondents contend that because these are "federal claims" that federal and not state law governs the granting of interest. Citing Board of County Commissioners of the County of Jackson v. United States, 308 U.S. 343 (1939), and 28 U.S.C. § 1961, they assert that federal law authorizes such interest. Neither citation aids respondents. In Board of County Commissioners of the County of Jackson v. United States, 308 U.S. 343

(1939), the United States sought recovery of taxes and interest because of property taxes improperly levied upon land owned by a Pottawatomie Indian. Kansas law did not provide for interest upon taxes wrongfully collected and although rights under a federal treaty were involved, under the circumstances there present the court determined that interest could not be collected. Title 28 U.S.C. § 1961 allows interest "on any money judgment in a civil case recovered in a district court." This matter is not in a district court and even there where a case is based on state law, state law controls on the allowance and rate of interest. Budge V. Post, 643 F.2d 372, 375 (5th Cir. 1981); E.C. Ernst, Inc. v. Manhattan Construction Company of Texas, 551 F.2d 1026, 1042 (5th Cir. 1977), cert. denied 434 U.S. 1067 (1978).

In Missouri the state is not liable for interest on overpaid taxes in the absence

of a statute so providing. International Business Machines Corporation v. State Tax Commission, 362 S.W.2d 635, 641 (Mo 1962); Simmons Hardware Co. v. City of St. Louis, 192 S.W. 394, 398-399 (Mo 1916). There is no statute providing for interest in this situation and thus no interest is allowable.

The judgment of the circuit court is affirmed insofar as the principal amounts of the refunds to the named respondents was there determined and the judgment is reversed in all other respects. The cause is remanded to the circuit court with directions that it enter an order affirming the decision of the State Tax Commission denying respondents the right to bring a class action on behalf of others and denying respondents interest on the amount of their refunds. Appellant's motion to strike previously taken with the case is denied.

James K. Prewitt,
Special Judge

Rendlen, C.J. Higgins,
Gunn, Billings, Blackmar
and Donnelly, JJ., concur.
Welliver, J., not sitting.

APPENDIX C

IN THE CIRCUIT COURT OF COLE COUNTY,

MISSOURI

STATE OF MISSOURI, ex rel. ELLSWORTH

FREIGHT LINES, INC., et al.,

PLAINTIFF

vs.

STATE TAX COMMISSION OF MISSOURI

DEFENDANT-RESPONDENTS

NO. CV 179-28

DIVISION 2

AMICUS CURIAE BRIEF ON BEHALF

OF ROCOR INTERNATIONAL

IF THIS COURT FAILS TO UPHOLD THIS MATTER AS A CLASS ACTION OR TO TOLL THE STATUTE OF LIMITATIONS BY REASON OF THE PENDENCY OF THE CLASS ACTION, THERE WOULD BE A DENIAL OF DUE PROCESS.

Rocor International is a nation-wide trucking firm and, it belives, is an unnamed member of the class actions filed in this matter.

These matters were originally filed as class actions before the Missouri Reciprocity Commission on December 8, 1969, and in the Circuit Court of Cole County Missouri on October 20, 1970. The Circuit Court held this was an appropriate class action and notice was given in June, 1975.

Rocor International relied on the pendency of the class action litigation to protect its rights. If this court applies a two year statute of limitations and fails to find this matter a proper class action or as tolling the limitations period, Rocor has been prejudicially misled and denied its rights in violation of due process.

Respectfully submitted,

_____

_____

APPENDIX D

Filed on August 25, 1983
In Office of Clerk
Supreme Court of Missouri

NOTICE OF APPEAL FROM STATE COURT, CIVIL CASE

IN THE SUPREME COURT OF THE STATE OF MISSOURI

ELLSWORHT FREIGHT LINES et al.,
Appellant

v.

STATE TAX COMMISSION OF MISSOURI
Appellee.

NO. 64266

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ellsworth Freight Lines et al., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri dismissing the petition entered in this case on May 31, 1983.

This appeal is taken pursuant to 28, U.S.C. § 1257(2)

Attorney for Ellsworth Freight Lines
Appellant

Howard M. Downs
200 McAllister Street
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(415) 557-0448

CERTIFICATE OF SERVICE BY MAIL

I, Howard M. Downs, certify as follows:

That I am over the age of eighteen and not a party to the within cause;

My business address is 200 McAllister Street, San Francisco, California 94102.

On August 23, 1978, two copies of the Notice of Appeal from State Court, Civil Case were placed in an envelope addressed as follows:

John Ashcroft, Attorney General
Richard L. Wieler, Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101

Said envelope with postage fully prepaid was then sealed and deposited in United States Mail in San Francisco, California.

DATED: August 23, 1983

Howard M. Downs
Howard M. Downs
Attorney at Law

Office-Supreme Court, U.S.
FILED
DEC 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-593

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants.

v.

STATE TAX COMMISSION OF MISSOURI,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

Table of Authorities:

Cases II

Statutes III

Other Authorities III

Motion to Dismiss or Affirm:

The State Statute Involved and
The nature of the Case 2

Argument 8

Conclusion 18

TABLE OF AUTHORITIES

Cases

Dows v. *City of Chicago*, 11 Wall. 108, 20 L.Ed. 65 (1871) 16

Edelman v. *Jordan*, 415 U.S. 651 (1974) 13

Ellsworth Freight Lines v. *Missouri Highway Reciprocity Commission, 35 al.*, 568 S.W.2d 521 (Mo. banc 1978) appeal dismissed, cert. den. 440 U.S. 901 (1979) 3, 4, 7, 8, 9, 16

Evansville-Vanderburgh A. A. Dist. v. *Delta Air Lines, Inc.*, 405 U.S. 717 (1972) 11

First National Bank of Greeley v. *Board of County Commissioners of the County of Weld*, 264 U.S. 450 (1924) 16

Gas Service Company v. *Morris*, 353 S.W.2d 645 (Mo. 1962) 3

Kane v. *New Jersey*, 242 U.S. 160 (1916) 10

Murray v. *Wilson Distilling Company* 213 U.S. 151 (1909) 12

Parden v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964) 12, 13

Petty v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) 12, 13

State ex rel. Brady Motorfrate, Inc., et al. v. *State Tax Commission*, 517 S.W.2d 133 (Mo. 1974) 3, 8, 15

Steel Haulers, Inc. v. *United States*, 316 F.Supp. 707 (W.D.Mo. 1970), aff'd 440 F.2d 1176 (8th Cir. 1971) 15

Transport Rentals, Inc. v. *Carpenter*, 325 S.W.2d 745 (Mo. 1959) 10

Statutes

§ 136.035, RSMo 1978 .....2, 3, 4, 5, 6, 7, 9, 10, 11, 16
§ 301.090, RSMo 1978 14
§§ 301.271-301.279, RSMo 1978 14

Other Authorities

60 C.J.S., Motor Vehicles, § 61, p. 408 10
Mo. Constitution, Art. IV, § 30 14

No. 83-593

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELLSWORTH FREIGHT LINES, INC., et al.,
Appellants.

v.

STATE TAX COMMISSION OF MISSOURI,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of § 136.035, RSMo 1978,[1] and the construction placed upon this Missouri statute by the Missouri Supreme Court with respect to the attempted recovery of highway registration taxes collected improperly by the state of Missouri. Section 136.035, RSMo 1978, provides as follows:

> 1. The director of revenue from funds appropriated shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.
>
> 2. The director of revenue shall refund any overpayment or erroneous payment of any tax on tangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.
>
> 3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded.

---

[1]The controversy herein predates 1978, but the statute as recodified in 1978 remains the same as the version in effect during the controversy and, therefore, all references will be to the 1978 codification.

In addition to the current dispute, appellants have caused the Missouri Supreme Court to construe this statute on a prior occasion. In *Ellsworth Freight Lines* v. *Missouri Highway Reciprocity Commission, et al.*, 568 S.W.2d 521 (Mo. banc 1978), appeal dismissed, cert. den. 440 U.S. 901 (1979), the Missouri Supreme Court determined that a direct action for recovery of highway registration fees initiated in a circuit court in Missouri would not lie and that the appellants must pursue their refunds through the administrative remedies provided by statute. This ruling followed a line of cases in Missouri holding that where the Missouri legislature has provided a procedure for the recovery of taxes illegally collected, this procedure is exclusive and must be followed. See *Gas Service Company* v. *Morris*, 353 S.W.2d 645, 654-655 (Mo. 1962); and *State ex rel. Brady Motorfrate, Inc.* v. *State Tax Commission*, 517 S.W.2d 133, 137-138 (Mo. 1974).

Section 136.035, RSMo 1978, is the exclusive procedure adopted by the Missouri legislature for recovery of highway registration fees collected improperly in this state. It requires the filing of a written claim setting forth the specific grounds upon which the claim is founded, and it limits the right of refund to within two years from the date of filing.

In the present dispute, the appellants utilized the exclusive procedure available under § 136.035, RSMo 1978, but refused to accept the restrictions. Following a successful appeal by the appellants to the Circuit Court of Cole County, Missouri (Appendix A of appellants' jurisdictional statement), the Missouri Supreme Court again reviewed § 136.035, RSMo 1978, and applied it to reverse the circuit court's opinion (Appendix B of appellants' jurisdictional statement). The Missouri Supreme Court again confirmed the statute with its restrictions as the exclusive means of

recovery thereby limiting the named appellants to a two year limitation period from the date of their claims, disallowing any payment of interest under the statute, and denying the propriety of a class action under the statute as written.

B. The Proceedings Below

Subsequent to the dismissal of appeal and denial of certiorari by this court from the decision of the Missouri Supreme Court in *Ellsworth Freight Lines* v. *Missouri Highway Reciprocity Commission, supra,* the appellants pursued the remedies available to them under § 136.035, RSMo 1978, in the state of Missouri. Prior to the filing of the lawsuit to collect directly in the Circuit Court of Cole County, Missouri, three of the appellants, Ellsworth Freight Lines, Inc., Hirschbach Motor Lines, Inc., and Kroblin Refrigerated Xpress, Inc., along with two other trucking firms, Bruce Motor Freight, Inc., and Brady Motorfrate, Inc., had filed a claim for refund with the Director of Revenue in late 1969 for highway registration fees allegedly collected in violation of the Vehicle Registration Proration and Reciprocity Agreement (Uniform Compact) to which the state of Missouri was and is a party. The hearing on the applications for refund was held before the Director of Revenue on July 25, 1970, at which time the two year statute of limitations contained in § 136.035, RSMo 1978, was pointed out. Brady and Bruce appealed the decision of the Director of Revenue against their claim to the State Tax Commission and ultimately to the Missouri Supreme Court, where it was held that the formula used by the Missouri Highway Reciprocity Commission in determining registration fees had been improper, but that the two statutes of limitations contained in § 136.035, was applicable. *State ex rel. Brady Motorfrate, Inc.* v. *State Tax Commission, supra.*

During this period, the Director of Revenue also denied the claims of Ellsworth, Hirschbach and Kroblin. At that time, these appellants filed an application for review of the Director's decision with the Missouri State Tax Commission, the next step for reviewing the Director's decision at that time. No further action was taken, however, until resolution of the dispute directly filed in the Circuit Court of Cole County and resolved contrary to appellants' position by the Missouri Supreme Court.

The entire controversy was placed before the Missouri State Tax Commission for a decision based on a stipulation. After reviewing the stipulation and the attached exhibits, the Missouri State Tax Commission made a decision on December 19, 1978. In that decision, the Commission found that a class action could not be maintained under § 136.035, RSMo 1978, and that the two year statute of limitations set forth therein could not be tolled by the filing of a class action. Furthermore, the Commission found that no facts had been presented to show that the state had induced delay in the filing of any refund, thereby negating any claim by the appellants of estoppel. Recovery was granted to the three named appellants for the two year period preceding their initial claims, but no interest was allowed on that recovery.

A petition for judicial review was timely filed by the appellants to the Cole County Circuit Court. In that petition, the appellants again stated that a claim for refund was unnecessary because of the nature of the violation. On July 7, 1982, the Cole County Circuit Court entered a judgment finding that the Missouri Highway Reciprocity Commission had violated the Uniform Compact by not following the mileage formula therein when computing highway registration fees, and that such violation created an unreasonable burden on interstate commerce, destroyed the

obligations of contract of the appellants, and violated the due process, equal protection and privileges and immunities rights of the appellants. The Circuit Court of Cole County, Missouri, also found that a class action was permissible but, in the alternative, the statute of limitations should be tolled to allow the filing of claims for refund by other trucking companies. Finally, the Circuit Court of Cole County, Missouri, awarded interest of five percent on all monetary claims.

On appeal to the Supreme Court of Missouri, the appellees argued that the circuit court erred in reversing the decision of the Missouri State Tax Commission denying a class action because § 136.035, RSMo 1978, the exclusive means of recovering overpayments of highway registration fees, does not provide for class actions, and further that the filing of the purported class action under this section did not toll the two year statute of limitations. Appellees further argued that the circuit court erred in reversing the decision of the Missouri State Tax Commission concerning interest because interest is not applicable in actions for recovery of taxes collected improperly under § 136.035, RSMo 1978. Contrary to the assertions made by the appellants, the appellees argued that the state of Missouri had not waived any of its statutory rights with respect to the exclusive procedures to be used in seeking refund of tax because of the basic right possessed by the state as a sovereign to exact a fee for the privilege of operating motor vehicles within its territory in the absence of an express waiver of said right. In the context of state taxation, the appellees argued that any discussion of appellants' so-called "federal rights" must be limited to the determination of whether a remedy is available under state law and whether the appellants had properly utilized it.

For their part, the appellants continued to argue, as

they had in the prior *Ellsworth* case, that their basis for refund was an alleged violation of "federal rights" so that the state of Missouri could not qualify or condition recovery by local rules of practice including Chapter 136, RSMo 1978. In ruling in favor of the appellees, the Supreme Court of Missouri reiterated its findings in the prior *Ellsworth* case that the assertion of a "federal right" did not entitle the appellants to avoid the procedures set forth in § 136.035, RSMo 1978. Although recognizing that an assertion of federal rights could not be defeated under the name of local practice, the Supreme Court of Missouri again noted that the claims of the appellants were not defeated by the requirement that they be pursued through use of the remedy given by § 136.035, RSMo 1978. *State ex rel. Ellsworth Freight Lines, et al.* v. *State Tax Commission of Missouri,* Supreme Court of Missouri, Case No. 64266, decision issued on May 31, 1983 (Appendix B of Appellants' Statement of Jurisdiction, pp. 11-12).

II.

ARGUMENT

This case Presents no Substantial Question for Review of the Decision by this Court

In the statement of jurisdiction filed with this Court, appellants have again pointed out that the circuit court in Missouri found that certain practices used by the Missouri Highway Reciprocity Commission in computing the amount of highway registration fees due from the appellants as a result of their activity within this state violated rights contained in the United States Constitution. In view of this and because the appellants operate in interstate commerce, appellants claim that all local procedures and limitations for the recovery of such taxes as imposed by the state of Missouri must be cast aside. This is precisely the argument raised by appellants in an earlier case appealed to this Court, *Ellsworth Freight Lines, Inc., et al.* v. *Missouri Highway Reciprocity Commission, et al.*, 568 S.W.2d 521 (Mo. banc 1978) appeal dismissed and cert. den. 440 U.S. 901 (1979), in which this Court dismissed the appeal for want of jurisdiction and, treating the papers as a petition for writ of certiorari, denied certiorari. *See,* 440 U.S. 901 (1979).

The activities of the Missouri Highway Reciprocity Commission which led to this dispute are well documented. They were the subject of two lawsuits which culminated in the Missouri Supreme Court, *State ex rel. Brady Motorfrate, Inc., et al.*, v. *State Tax Commission,* 517 S.W.2d 133 (Mo. 1974), and *Ellsworth Freight Lines, Inc., et al.* v. *Missouri Highway Reciprocity Commission, et al., supra.* In *Brady, supra* at 135-136, the Missouri Supreme Court held that the unilateral breach of the Uniform Compact to

which both Iowa and Missouri were members by the state of Iowa by permitting the use of a method of calculation of highway registration fees known as the "compact mile" formula rather than the "total fleet" formula set forth in the compact did not authorize the state of Missouri to take similar action. Accordingly, recovery was allowed to the two named motor carriers, Brady Motorfrate and Bruce Motor Freight, on their claims for refund filed with the Missouri Director of Revenue under § 136.035, RSMo 1978. However, recovery was limited to the two years preceding application in accordance with the statute of limitations contained therein.

The prior *Ellsworth Freight Lines* case highlights the dispute even further because it deals with the first attempt by the appellants herein to obtain a refund of highway registration fees without exhausting the exclusive administrative remedies through direct action in circuit court. Although the appellants contended that they were entitled to sue directly in the trial court because the basis for refund was an alleged violation of "federal rights," the Missouri Supreme Court after reviewing the record determined that § 136.035, RSMo 1978, was the exclusive means of recovery and, accordingly, ordered the Circuit Court of Cole County to dismiss the petition filed by the plaintiffs. *Ellsworth Freight Lines, et al.* v. *Missouri Highway Reciprocity Commission, et al., supra* at 524-525.

In the current dispute as appealed to this Court by the appellants, the Missouri Director of Revenue conceded before the Missouri State Tax Commission that the application of the "compact mile" formula to highway reciprocity fees assessed against the appellants was improper, but maintained that class actions for refund of taxes collected illegally are not allowed in the state of Missouri, and that § 136.035, RSMo 1978, sets forth a two year statute of limitations. The Missouri State Tax Commission agreed

with the Director of Revenue's position and also held that the two year statute of limitations was not tolled by the purported filing of a class action. Furthermore, the State Tax Commission found no facts to show that the state induced delay of the filing of any refund claim.

This ruling by the Missouri State Tax Commission was affirmed by the Supreme Court of Missouri and, contrary to appellants' assertions, is a correct interpretation of the law. It has long been held that the police power of the state to regulate the use of motor vehicles on its highways extends to nonresidents as well as residents. *Kane* v. *New Jersey*, 242 U.S. 160, 167 (1916). Under its police power, a state may require a nonresident motor vehicle oyner to register and pay a reasonable registration for the privilege of operating his vehicle over the highways of this state. *See*, 60 C.J.S., Motor Vehicles, § 61, p. 408. In the absence of any federal legislation on this subject, the state of Missouri has the basic right of any sovereign to exact a fee for the privilege of operating within its territory, whether it be a motor vehicle or operating a business. The fact that this state determined to cooperate with other jurisdictions in setting the fees to be charged for the operation of motor vehicles in no way diminishes or waives state requirements concerning refund of those fees, absent further evidence that the state intended to do so.

Highway registration fees are taxes for the privilege of operating motor vehicles on the highways of this state. *Transport Rentals, Inc.*, v. *Carpenter*, 325 S.W.2d 745, 749 (Mo. 1959). It should be understood that the state of Missouri has not, by joining the Uniform Compact, thrust itself into the realm of interstate commerce or regulation of such *per se* but rather has attempted to tax activities within this state with the aid of a formula developed in conjunction with certain sister states. This Court has said that a state may use various methods in imposing a fee for the privilege

of using its roads as long as the fee is not excessive. It is the amount of the tax that is of central concern, not the particular formula involved. *See, Evansville-Vanderburgh A. A. Dist.* v. *Delta Air Lines, Inc.*, 405 U.S. 717 (1972). If it chose to do so, the state of Missouri could remove itself from this particular compact with its particular formula, or any other formula, and impose a flat fee on interstate carriers for the privilege of using the roads in this state. Having made full use of the Missouri highways during this period, the burden was on the appellants to demonstrate that the fee charged them exceeded fair compensation to the state for the privilege of using the highways. The record below does not demonstrate, nor could it, that the fees actually charged and paid by the appellants were excessive or burdensome to interstate commerce. At best, it demonstrates that the Missouri Highway Reciprocity Commission deviated from the formula agreed to among it and certain sister states, a formula contained within a compact to which the appellants were not a party.

The only question to be resolved is whether or not the state of Missouri can be compelled to forego the limitations found by the Missouri Supreme Court in § 136.035, RSMo 1978, because of the entry by the state of Missouri into this compact with several other states in which a uniform formula for determining the annual amount of highway registration fees was agreed upon, and then not used. Apparently, the appellants are convinced that the mere entry by the state of Missouri into the Uniform Compact coupled with the interstate nature of the appellants' business is sufficient to endow the appellants with certain "federal rights" of such a character that the state of Missouri is powerless to assert any exclusive statutory remedies or procedures governing the refund of taxes paid for activities conducted herein. This is not true. The actions of this state in no way diminish or waive state requirements re-

specting refund of taxes in the event they are collected improperly, absent further evidence that the state intended to do so. This Court has said distinctly that waiver of sovereign immunity will be found only where stated by "the most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Company*, 213 U.S. 151, 171 (1909).

Appellants attempt to distinguish by citing several cases which deal with the question of waiver of sovereign immunity by a state with respect to the Eleventh Amendment to the United States Constitution. Based on this, appellants proclaim that the governing law of this action is federal law and that all Missouri laws adversely affecting their position must be considered waived in view of an overwhelming "federal right." However, a review of the two principal cases, *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), reveals that the cases do not support the proposition for which cited.

The *Petty* case involved a suit in federal court under the provisions of the Jones Act against the Tennessee-Missouri Bridge Commission, a commission organized pursuant to a compact between the states of Tennessee and Missouri which had been specifically approved by the United States Congress pursuant to the compact provision of the United States Constitution. The bridge commission raised the question of immunity from suit pursuant to the Eleventh Amendment, which forbids suits by individuals against the state in federal courts. The critical question according to this Court is whether or not the state had intended by its action to waive traditional concepts of sovereign immunity. *Petty* v. *Tennessee-Missouri Bridge Commission*, *supra* at 278. This Court found that the state

had clearly waived any claim of sovereign immunity by accepting the compact agree because the agreement itself specifically provided for a right to sue and be sued in language formally adopted by Congress. *See, Petty* v. *Tenneesee-Missouri Bridge Commission*, supra at 280.

The *Parden* case involved a suit in federal court against the state of Alabama under the Federal Employers Liability Act. The damages involved were suffered on the job while employed by a railroad operated by the state of Alabama. In determining that the defense of sovereign immunity was not available, this court held that the state of Alabama had affirmatively waived such a defense with respect to operations under the Federal Employers Liability Act by engaging in the business of operating a railroad. In other words, the waiver stemmed from the state's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, had attached the condition of amenability to suit. Perhaps the best description of the impact of the *Petty* and *Parden* cases is contained in the language of this Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), in which the following comment was made:

> Parden . . . involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included states or state instrumentalities. Similarly, Petty v. Tennessee-Missouri Bridge Comm'n., supra, involved congressional approval, pursuant to the Compact Clause of a compact between Tennessee and Missouri which provided that each compacting state would have the power "to contract, to sue, and be sued in its own name." The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the state by its

participation in the program authorized by Congress had in effect consented to the abrogation of that immunity. *Id.* at 671-72.

The question has never been one of federal law versus state law, as asserted by the appellants, but rather whether or not the state of Missouri has waived any of its statutory rights with respect to the exclusive procedures to be used in seeking refunds of taxes by its entry into an interstate compact with certain of its sister states for the purpose of registering motor vehicles. In determining whether or not such a waiver can be found, the following facts are of importance: the Highway Reciprocity Commission was created by the Missouri legislature in §§ 301.271 through 301.279, RSMo 1978. Those sections give the Commission its specific authority to enter into direct reciprocal agreements or arrangements with other states, the District of Columbia, territories of the United States, and foreign countries under the terms and conditions set forth in § 301.277, RSMo 1978. These sections do not give the Commission the power to sue or be sued, nor do they give the Commission the power to abrogate other state statutes dealing with the refund of taxes. All fees collected for the registration of motor vehicles in this state are deposited with the State Treasury to the credit of the State Highway Department Fund pursuant to § 301.090, RSMo 1978. Art. IV, § 30 of the Missouri Constitution provides that such highway funds stand appropriated without the consent of the legislature for road building purposes and no other.

The grant of authority to the Missouri Highway Reciprocity Commission by the Missouri legislature was a limited grant of authority dealing only with negotiation and entry into various compacts for the purpose of establishing a fair and equitable means of taxing motor vehicles engaged in interstate commerce in this state. There is no showing that the Commission was ever authorized to

abrogate traditional Missouri law with respect to the claiming of a refund for taxes collected illegally. The only evidence that appellants produced to show that the state had waived any of its procedural requirements concerning refund of taxes is the mere entry into the Uniform Compact by the state of Missouri. This hardy constitutes a waiver through express language or by overwhelming implication.

When referring to the compact which forms the basis for appellants' claims for relief, it is necessary to keep in mind that proper principles of construction require that the limits established by statute on the ability to enter into a contract be given primary emphasis in determining the rights and liabilities under the terms of such compact. *Steel Haulers, Inc.*, v. *United States*, 316 F.Supp. 707 (W.D. Mo. 1970), aff'd, 440 F.2d 1176 (8th Cir. 1971). In reviewing the terms and conditions of the Compact itself, it is readily apparent that no provisions are dedicated to the question of refunds of highway registration fees. In fact, Art. III, § 34 of the Compact specifically indicates that the Compact is meant to change only those laws in each state pertaining to registration fees and then only to the extent provided. Indeed, it would have been outside the scope of the authority granted to the Missouri Highway Reciprocity Commission to have negotiated and entered into a compact which did provide methods and procedures for refunds deviating from the standards established by statute.

Appellants have been trumpeting their "federal rights" since these disputes began. In so doing, they ignore the fact that relief was available under Missouri law and was successfully used by other motor carriers. *See, State ex rel. Brady Motorfrate*, Inc., 517 S.W.2d 133 (Mo. 1974). Furthermore, no taxpayer would be powerless to prevent improper tax collection through appropriate legal action to enjoin further unlawful conduct. However, appellants themselves admitted in the prior lawsuit filed di-

rectly against the state of Missouri in the Circuit Court of Cole County (*see, Ellsworth Freight Lines, Inc., et al.* v. *Missouri Highway Reciprocity Commission,* 568 S.W.2d 521 (Mo. banc 1978), appeal dismissed and cert. den. 440 U.S. 901 (1979), that injunction was no longer necessary because Missouri had ceased applying the formula complained of in some instances and obtained an amendment to the Uniform Compact which authorized a different formula in others.

This Court has long recognized the important and sensitive nature of state tax systems and the need for restraint when deciding cases that affect such systems. *See, Dows* v. *City of Chicago,* 11 Wall. 108, 110, 20 L.Ed. 65 (1871). Invoking principles of comity, this Court has refused to determine the constitutional validity of a state tax where a remedy was available under state law and the taxpayer had not utilized it. *First National Bank of Greeley* v. *Board of County Commissioners of the County of Weld,* 264 U.S. 450, 453-54 (1924). State procedures for obtaining tax refunds should not be ignored or evaded where state means for protection of rights are available because of the overriding need of the state to protect its tax base.

Missouri law provides the means for complete relief from the violations alleged by the appellants. Injunctive remedies were available to prevent the collection of the taxes computed incorrectly at any time before they were paid. Furthermore, every taxpayer who was overcharged had the right under § 136.035, RSMo 1978, to challenge the assessment and seek a refund. Appellants here are not complaining about the lack of a remedy, they are complaining about the limitation on the amount of their recovery. This in no way affects the nature of the remedy available, but only highlights the unfamiliarity of the appellants with the nature of the remedy available. The concept of "federal rights" cannot be expanded to include the right to a class

action or the right to ignore applicable statutes of limitation under any theory presented by the appellants. The state of Missouri, like any sovereign, has the right to protect its tax base by insisting that suits for refund of taxes meet certain minimal standards. No one can complain about those standards as long as the right to challenge the constitutionality or propriety of the underlying tax has been fully preserved. The named appellants herein deliberately chose the time for commencement of proceedings in this state. The other members of the class supposedly represented by the named appellants chose not to utilize the Missouri procedures available and thereby lost their right to challenge past practices. This right should not be reconstructed on the basis of the record before the Missouri Supreme Court.

III.

CONCLUSION

Wherefore, appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

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December 30, 1983